

# **Doing Business with DBM**

## **General Procurement Information**

This page is designed to provide general information concerning procurement activities or other pertinent information the business community may find useful when working with DBM procurements.

### **DBM's Procurement Role**

#### **I. DBM's Role**

The Department of Budget and Management (DBM) is one of two statewide procurement control agencies in the Executive Branch of Maryland State government. The Department of General Services is the other. DBM's area of procurement control is services and information technology.

#### **II. DBM's Procurement Guidance and Training**

DBM helps to interpret State procurement law and regulations and provides guidance and training for State agency personnel. It reviews and comments on services, information technology and motor vehicle lease procurements. These procurements comprise a large portion of the State's procurements. The Department approves services and information technology solicitations from other State agencies prior to their release for bidding and contracts prior to implementation. The Department maintains offices at 45 Calvert Street in Annapolis and 300 and 301 W. Preston Street in Baltimore.

### **Types of Procurements Originated in DBM**

DBM does relatively little direct contracting for its own needs, including few small procurements. The Department primarily awards contracts with statewide impact. These typically large statewide contracts generally average over \$1 billion in annual value and fall into two major categories:

1. Human resources or personnel, e.g., health benefits, recruitment, training, and other personnel-related services for State employees; and
2. Information technology for State agencies.

## Minority Business Enterprise (MBE)

### I. DBM Focus

One of DBM's focal points is strong MBE participation in State contracts. In conjunction with the Office of Minority Affairs and the efforts of Maryland State agencies, DBM helps assure that State agencies fulfill the State's MBE participation goals.

### II. Minority Business Enterprise – Subcontracting Documentation – Instructions and Forms

1. Board of Public Works (BPW) MBE Instructions and Forms  
<http://www.bpw.state.md.us/001-96.htm>
2. DBM Monthly Forms
  - < Prime Contractor Unpaid MBE Invoice Report
  - < Subcontractor Payment Report

## Notice of Business Opportunities

### I. Where can I find procurement opportunities with the Department?

Vendors who wish to learn of procurement opportunities with DBM should visit the Maryland Contract Weekly website at <http://www.sos.state.md.us/sos/dsd/html/index.html>, the current "Bids and Proposals" section of DBM's website, or visit the Department's bid board located near the first floor lobby at 45 Calvert Street, Annapolis, MD.

The ***Maryland Contract Weekly*** is the State's primary vehicle for providing notification of procurement opportunities. By law, all procurement opportunities with Maryland State agencies that are anticipated to exceed \$25,000 in cost must be advertised in this publication.

The Maryland Contract Weekly is published weekly by the Division of State Documents and is available in two versions: an on-line version is available for \$79 a year. A mailed printed version will cost \$125 a year; or, you may receive both on-line and a printed version for \$150 a year. The Department does not maintain a general vendors' or bidders' list.

When you visit the Contract Weekly website, click on *About Contract Weekly* to find additional information about:

- The Contract Weekly
- Sample of the Contract Weekly
- Subscription form
- Procurement Guide - which contains information about:
  - < Doing Business with the State of Maryland
  - < Notice of Business Opportunities
  - < Business Preferences
  - < Agency Procurement Contacts

## **II. What solicitations are advertised in the Maryland Contract Weekly or posted on the Bid Board?**

State agencies must endeavor to obtain broad-based competition from responsive and responsible bidders. Solicitations for contracts valued between \$10,000 and \$25,000 must be either published in a newspaper or periodical of general circulation, or in an electronic media generally available to the business community, or posted on an agency bid board. Most small DBM procurements are not advertised in the Contract Weekly but can be found on the Department's Bid Board located at 45 Calvert Street, Annapolis, MD. In addition, many are also listed on the Current Bids and Proposals portion of this website. For contracts that are expected to exceed \$25,000, Maryland law requires that a solicitation notice be published in the Maryland Contract Weekly at least 20 days before bids are due.

## **III. How Do I get a copy of a published solicitation?**

The solicitation notice in the Contract Weekly or notice on the Bid Board will tell you whom to contact to get a copy of the document. A website listing will contain the document, as well as identify a contact person. State agencies are required to supply vendors with copies of the solicitation documents that are advertised. However, some documents require a fee prior to obtaining the document.

## **IV. Explain the difference between large procurements and small procurements?**

### **1. Large Procurements**

For contracts that are expected to exceed \$25,000, Maryland law requires that a solicitation notice be published in the Maryland Contract Weekly at least 20 days before bids are due. Additional information about the Maryland Contract Weekly is available on their website at:  
<http://www.sos.state.md.us/sos/dsd/html/index.html>.

### **2. Small Procurements**

#### **A. Overview**

A small procurement means the procedure used to obtain items reasonably expected by a procurement officer to cost \$25,000 or less or, in the case of revenue-producing procurements, to provide annual gross revenues to the State of \$25,000 or less (COMAR 21.05.07.01).

All State agencies have authority to make awards of services and information technology (except telecommunications) procurement contracts that do not exceed \$25,000, regardless of the method of source selection, e.g., competitive, sole source, or emergency procedures. The only limitation to this authority is that agencies may not artificially divide a single procurement requirement into a number of small procurements in order to avail themselves of this award authority. Because Maryland encourages broad-based competition from responsive bidders, notice of solicitations for contracts valued between \$10,000 and \$25,000 must be either published or posted on a physical agency bid board.

# **Vendor Information on Services and Information Technology Procurements**

## **I. Introduction**

The following information should familiarize you with some basic ground rules and tips when responding to DBM and other State agency procurements. If you understand the process that must be followed by State agencies, you are more likely to be successful in competing for State contract awards.

Have you ever heard of the saying: “an informed consumer is our best customer”? Well DBM believes that not only can the vendor achieve its goals by understanding the rules of the game, it can also assist the State in achieving its procurement goals. In other words, we can achieve a “win-win” situation. Indeed, there must be a “win-win” situation for continued existence of State procurement. If the vendor or the State perceives that it isn’t benefiting from the procurement process, it will drop out of the process; i.e., either the State will perform what is needed with its own workforce, or vendors simply won’t bid. This scenario could be detrimental to both sides. However, even with a “win-win” situation, each side will still seek to maximize its share of the winnings. This is the dynamic tension of procurement.

So now that we understand that the State and vendors need each other, how does the process work and how do we deal with the dynamic tension of the process?

## **II. Disclaimers**

Before starting the review process, we need to make some clarifying statements:

1. Although a considerable amount of information is presented in this document, by no means is this intended to be a comprehensive presentation of the State procurement process. Rather, it is a compilation of selected topics that, from our experience, cause the most problems for vendors.
2. The presented information will be of a general nature. There will always be specific situations when the general answer will not be the correct answer. In those cases, you should contact the appropriate DBM procurement person for appropriate guidance.
3. Although the presented information is general, you may still consider parts of it to be too technical. In such case, one of the benefits of a written presentation is the ability to simply skip such sections. Another benefit of a written document is the ability to refer back to it in the future if one of those technical (but still general) situations should arise.
4. The focus of this information is procurements that are anticipated to exceed the State’s small procurement threshold of \$25,000.

## **III. Procurement Law and Regulations**

From the State’s perspective everyone probably knows there is a virtual necessity for what is known as competition. With rare exceptions State agencies must go through a competitive process in awarding contracts for goods and services. Therefore, it is helpful to point out the general rules that State agencies must follow in this regard.

State procurement is governed by the State Finance and Procurement Article of the Annotated Code of Maryland and Title 21 - State Procurement Regulations, Code of Maryland Regulations (COMAR). COMAR Title 21, otherwise known as simply "Title 21," is the source document that you will see referenced in solicitations, and repeatedly hear State personnel quote in almost any procurement context. COMAR Title 21 has 390 pages of text on how State procurement is to be conducted. Title 21 covers a variety of procurement circumstances; however, it cannot cover every conceivable procurement situation. Much of what it does not specifically cover, and some of the finer aspects of what it does cover, is the primary focus of this briefing document. You may view Title 21 on the COMAR website at <http://www.dsd.state.md.us>.

The following Eight Policies and Purposes that appear in the first two pages of Title 21 are the bedrock for everything else that appears in this volume. Presumably, it is everything that State procurement is about and may explain why public procurements may seem so structured and difficult compared to private sector procurements.

### **1. Eight Policies and Purposes**

- A. Provide for increased public confidence in the procedures followed in public procurement.
- B. Ensure the fair and equitable treatment of all persons who deal with the procurement system of this State.
- C. Simplify, clarify, and modernize the regulations governing procurement by this State.
- D. Permit the continued development of procurement regulations, policies, and practices.
- E. Provide increased economy in State procurement activities and to maximize to the fullest extent the purchasing power of the State.
- F. Provide safeguards for the maintenance of a procurement system of quality and integrity.
- G. Foster effective broad-based competition through support of the free enterprise system.
- H. Promote development of uniform procurement procedures to the extent possible.

The doctrines of fairness and equitable treatment, integrity, broad-based competition, and public confidence permeate everything that is done in State procurement. While economy, i.e., saving money, is a major objective of the State's procurement process, it takes a back seat to the doctrines immediately named above and certain socioeconomic policies – from guaranteeing the rights of minority firms to providing for non-visual access to information technology for visually impaired people, to fostering drug and alcohol free workplaces (Title 21 of COMAR, Section 11). By understanding what the State is seeking to accomplish, in addition to simply a low price, vendors are better able to assist in ensuring that all State objectives are met.

## **IV. Competitive Procurements - Problems and Considerations**

There are many problems and considerations that can make a difference between success and failure on procurement for both the State and a vendor. The State believes that vigorous competition is the key to getting the best product/service, etc. at the best price. Therefore, State agencies may employ one of the two primary or one secondary competitive procurement methods for any given procurement. Each of these methods has strengths and weaknesses for the State and a vendor.

## **1. Competitive Sealed Bidding**

Competitive Sealed Bidding is specified as the preferred method to be used for most State procurements. It employs a procurement document called an *Invitation For Bids* (IFB). The strength of the sealed bidding method is that it is the simplest, quickest competitive procurement method. Under this method a State agency must know everything it wants - and must detail these items in the IFB. Vendors state how much they will charge (what they *bid*) to provide the required goods and/or services. If a vendor provides everything the State requested in the IFB, and that vendor is determined to be "responsive and responsible," and also has the lowest absolute price, that vendor will be awarded the contract.

The concepts of *responsibility* and *responsiveness* are fundamental elements of the sealed bidding method. Therefore, these concepts merit special emphasis, as follows.

### **A. Responsibility**

"Responsibility" means that a *vendor* has the capability, integrity, and reliability to provide needed goods and/or services. A State procurement officer must determine that the lowest absolute bidder can and likely will perform, as required, before a contract award can be made to that bidder. If the lowest absolute bidder is determined to be "not responsible," that bidder will not receive the contract award. This determination is based on factors such as references, experience, and financial solvency.

Evidence relating to a vendor's responsibility is usually provided along with the bid itself, as specified in the IFB. However, after bids have been opened, if a procurement officer believes that more information is needed in order to render a decision on the responsibility of the lowest bidder, that vendor will be so informed. The additional information pertaining to the bidder itself and not its bid may then be provided. However, a bidder can be determined as being "not responsible" for failing to provide the requested information in a timely manner.

### **B. Responsiveness**

"Responsiveness" is even more critical than "responsibility" under the sealed bidding procurement method. Responsive means that the *bid* conforms in all material respects to the requirements contained in a sealed bidding solicitation (IFB). If the vendor provides everything requested in the IFB, and is determined to be the most "responsive and responsible," then that vendor will be awarded the contract. Bidders must offer at a minimum exactly what the IFB specifications request. A bidder can also offer more than is required by the specifications but, under the sealed bidding method, it cannot be paid more for that additional offering. It has to be the lowest bidder, even with the extras it is offering.

The crucial issue is that a vendor cannot take exception to any significant aspect of the specifications – which means that a vendor is not offering exactly what everyone else is offering. Moreover, that vendor will not be given the opportunity to cure an issue of responsiveness (with the possible exception of minor technicalities). A bid response to an IFB has to be fully compliant with all material (significant) terms of the specifications at the time of the bid opening. Any attempt to qualify a bid by seeking to add additional language to, or to delete language from, the IFB specification renders the bid non-responsive. Therefore, the key warning for a sealed bid procurement is to read the IFB document very carefully, do exactly as instructed in the specifications, and do not take any exceptions to the specifications.

This has particular significance for Information Technology (IT) procurements that are conducted under the sealed bidding method. Frequently bidders on IT procurements take exception to areas of specifications and express a desire to negotiate different terms other than those contained in the

specifications. Some examples of the exceptions are liability requirements (indemnification), liquidated damages, acceptance conditions and/or period, ownership of source codes, rights of the State concerning the use, reproduction, or dissemination of IT programs, or payment terms such as progress payments or withholding provisions. **In sealed bidding procurements, however, the State is not permitted to negotiate with bidders. This means any material exception or condition to a sealed bidding procurement results in the offending bidder being declared non-responsive.**

A bidder found to be “non responsive” by the procurement officer cannot receive an award.

If the procurement officer finds that a low bidder is either non-responsive or not responsible that vendor cannot receive an award for the subject procurement.

### C. Questions/Suggestions

Given the harsh responsiveness rules of sealed bidding procurements, vendors may ask if they have any recourse to IFB specification they may not like, other than simply not submitting a bid. The answer is that they do have recourse. However, that recourse comes before bids are due, not after. Virtually all major State procurements have pre-bid (for sealed bidding procurements) or pre-proposal (for sealed proposals procurements) conferences. These are pre-scheduled public events that anyone may attend.

The purpose of a conference is to help ensure that bidders or offerors understand what they are being asked to bid on. Typically, potential bidders or offerors are encouraged to ask questions to enhance their overall understanding of the State’s needs and requirements. Nonetheless, such conferences should also be a forum to obtain feedback and suggestions from potential bidders/offerors on the specifications themselves, and even the procurement method being used. Even if the conducting State officials do not solicit bidders’ input on the specifications, bidders should speak up on areas they find objectionable and suggest ways to improve the specifications.

A bidder may be reluctant to make certain suggestions in a public setting in front of other competitors. However, that’s the way it must be under the fairness and equal treatment doctrine that has previously been emphasized. This is particularly true for sealed bidding procurements where taking material exception to specifications, or negotiating after bids are received, is prohibited.

Because a vendor may be reluctant to make suggestions at a conference, that vendor may make written recommendations or raise questions directly to the involved agency, believing they will receive a private response. This is not the case, however. During the period before bids or proposals are due, any substantive question or comment and the State’s response thereto must be distributed to all vendors that are known to have received the IFB solicitation document. Consequently, since other vendors are going to learn of the question and answer anyway, a vendor might as well ask the question at the pre-bid/pre-proposal conference so that full discussion might result.

The only suggestion regarding such reluctance is for a vendor to make a general or generic suggestion, rather than a specific one. For instance, a suggestion that an agency revise specifications to permit an alternate proposal solution will surely tip competitors that the vendor wants to offer something different, but it provides no clue of what the other vendor has in mind. If the general suggestion is too vague for the agency to consider, the vendor may have to divulge the specific intent. At least the vendor can initially try not to disclose all of his/her strategy.

A State agency may or may not make any of the changes a vendor suggests. Nevertheless, agency personnel will listen to the vendor and make an informed decision of whether to change any part of the specifications.

If the specifications are to be changed, this can only be accomplished via a formal addendum to the specifications. Specifications must be in writing in order to be effective and cannot be changed verbally at a pre-bid/pre-proposal conference. If, however, the final answer is that the specifications aren't being changed, at least the vendor will know in time to either bid a sufficient price from the vendor's perspective to cover whatever is being required, or to simply not bid. A vendor will also know in a sealed bid procurement not to waste its time and money by submitting a qualified bid that takes a material exception.

#### **D. Sealed Bidding Variations**

There are two variations on pure or traditional sealed bidding. The first is an occasionally used method where the contract award is made on the basis of the lowest evaluated bid price. A typical example of an evaluated bid is to award a contract for equipment, possibly IT equipment, on the basis of life cycle costs. Life cycle costs include not only the initial purchase price, but also installation and removal costs, and the cost over the projected useful life of the equipment of items such as: electricity to operate; electricity and/or other costs for special air conditioning or other needs; maintenance/upkeep; required software purchases and/or licensing fees; number of personnel needed to operate and their wages; and special training that may be needed for personnel to be able to operate.

#### **2. Multi-step Sealed Bidding**

The second type of a sealed bidding method is called "*multi-step sealed bidding*" or "*two step*" bidding. Multi-step sealed bidding is a hybrid of sorts between the traditional or pure sealed bidding process and the sealed proposals method that will be described later. Multi-step bidding features technical proposals and evaluations and separately submitted sealed bid packages, similar to the sealed proposal method. However, this is where the similarity with sealed proposals ends. The only purpose of the technical proposal in Multi-step bidding is to help an agency decide if vendors appear to have the technical capability to perform the needed service. This decision must be made on the basis of the technical proposal, as originally submitted, except for issues involving responsibility that was discussed previously.

Since multi-step bidding is still a form of sealed bidding, the same rules and/or prohibitions apply as follows:

- A. There can be no discussion or negotiation regarding proposals, hence there can be no revisions of proposals (clarifications of proposals are permitted, but these cannot change the proposal).
- B. Vendors cannot take exceptions to the specifications – the concept of responsiveness does apply under Multi-step bidding.
- C. The lowest responsive and responsible bidder must be selected for award – the evaluation of the technical proposals comes down to a pass/fail decision for each bidder.
- D. The financial proposals (bids) must be opened publicly. The date, place, and time for this public bid opening can be listed in the specification or a separate notice can be sent to every vendor that received the specifications (not just those that submitted a bid).

In Multi-step bidding, the separately packaged bid price can be requested in two ways, as will be explained in the IFB:

- (i) All bidders are required to submit their sealed bid prices at the same time as their technical proposals; or

- (ii) Only technical proposals need to be submitted by the bid due date. Thereafter, only those bidders whose technical proposals are judged to be acceptable will be directed to submit their sealed bid price by a specified time, date, and place after which they will be publicly opened.

The strengths of the multi-step procurement method are that it allows a more thorough evaluation of a bidder's capabilities than under the traditional sealed bidding method, and it's easier, faster, and less labor intensive than the sealed proposals method.

The weaknesses are that it is more time consuming and complicated than the sealed bidding method, and not as flexible as the sealed proposals method, especially in its inability to obtain the best value for the State.

### **3. *Competitive Sealed Proposals***

Competitive Sealed Proposals (sealed proposals) is the preferred procurement method for human, cultural, social, and educational services and real property leases. Sealed proposals can also be used when specifications cannot be drafted that permit price alone to be the contract award determinant.

Sealed proposals is initiated via a procurement document called a *Request For Proposals* (RFP). In many ways sealed proposals is the opposite of sealed bidding. Whereas sealed bidding requires the State to take the lowest priced responsive and responsible bidder, sealed proposals anticipates that the most advantageous offeror will receive the award. The most advantageous offeror status is determined by considering both the technical offer and price as described in the RFP. In other words, in sealed proposals the State is seeking the best value.

In sealed bidding the two concepts of responsiveness and responsibility are discussed. In sealed proposals the responsibility concept applies with the same meaning and considerations as described in sealed bidding. However the concept of responsiveness does not exist in sealed proposals. By providing the following explanation of the sealed proposals process, the rationale for the non-existence of the responsiveness concept should be evident.

#### **A. Discussions**

The essence of sealed proposals is for State officials to hold discussions with qualified or potentially qualified offerors, with those offerors then revising their proposals to incorporate or address the discussion topics. This procurement method anticipates that the State will try to get the best deal that it can in the long run, not just the best deal that vendors offered in their initial proposals.

Therefore, time permitting, offerors that seem to have a chance of successfully performing the technical aspects of a procurement (are at least potentially qualified) should be informed by the State procuring officials of perceived deficiencies in their proposals via the discussion process. They should then be permitted to revise their proposals to attempt to eliminate or reduce the deficiencies. This ability to revise proposals applies to major deficiencies as well as minor ones. This is why the term "non-responsive" is not appropriate in RFPs.

As with sealed bidding procurements, under the sealed proposals procurement method, vendors should raise concerns and make suggestions at the pre-proposal conference rather than assume they can negotiate them away during discussions. The reasons for this are threefold. First, if stated in the RFP, agencies aren't required to hold discussions due to time or other considerations;

secondly, agencies don't have unfettered leeway to negotiate. There are some "boilerplate" clauses, etc., which must be used without change; and thirdly, an agency may not want to make a suggested change. As with sealed bidding, it is better to know if a State agency can't or won't make a recommended change before you submit a proposal rather than after.

## **B. Alternate Proposals**

In a sealed proposals procurement, a vendor should look in the RFP specifications to see if an *alternate proposal* submission is permitted. An alternate proposal means that you think you can satisfy the objectives of the procurement better by proposing to do something other than in exact conformance with the specifications.

Under sealed proposals, taking exception to sections of the specifications should not mean automatic rejection (remember, you can't be non-responsive). In fact, alternate proposals (if permitted in any particular RFP) by definition take exception to at least some aspect of the RFP. If alternate proposals are permitted in an RFP, the State agency can allow such submission in one of the following two ways:

- (i) An alternate proposal may only be submitted in addition to a regular, or primary proposal that fully conforms to the specifications.
- (ii) It is permissible for the alternate proposal to be the only one submitted. Whichever way alternate proposals are permitted, the allowance for discussion and revision, if there is sufficient time, also applies to an alternate proposal.

## **C. Evaluation Process**

A procurement by sealed proposals is a *subjective* process. In this process an evaluation committee empanelled by the procuring State agency:

- (i) Reviews offerors' technical proposals.
- (ii) Time permitting, holds discussions with offerors which are technically acceptable or potentially acceptable.
- (iii) Reviews the revised technical proposals of these offerors.
- (iv) Opens price proposals for those offerors finally determined to be *reasonably susceptible of being selected for award* based upon their final technical proposals.
- (v) Reviews *best and final offers* if requested from offerors by the procurement officer.
- (vi) Makes a recommendation to the procurement officer for the subject procurement and the head of the involved State agency of which offeror in their collective judgement is perceived as affording the best deal to the State.

The strength of the sealed proposals procurement method is the ability for State personnel to hold discussions with offerors and receive subsequent proposal revisions to achieve the ultimate goal of best value for the State. The weakness is that it is by far the most time consuming of the competitive procurement processes and the one that requires the highest commitment of personnel resources, hence cost, especially for vendors.

## V. State Ethics Law

There are other areas of State procurement that should be important to a vendor. For example, the State ethics law and the prohibition against bidding on a contract when you have assisted with the preparation of specifications. Since 1994, the Maryland ethics law has barred the State from awarding a competitively procured contract to a vendor that has assisted with drafting the specifications.

Because of this prohibition and the sometimes hazy distinction of exactly what constitutes “assisting,” many agencies will not talk to any vendor while working on specifications out of fear of any suggestions, comments, or even information, that might be viewed as assistance. However, comments at a public forum are permissible, e.g., an advertised forum to specifically seek public input on a proposed procurement. The most common public forum is the pre-bid/pre-proposal conference. This is another reason why attendance at such a conference and comments/feedback from vendors is so desirable from both the State’s and general vendor perspective.

In addition to the general prohibition described above, there are two ways (taken from actual instances) that vendors can run afoul of the ethics law. In the first instance a company hired a State employee who had been working on the specifications for a particular procurement. Even though this company affirmed that the former State employee did not work on or consult in any way with the proposal in response to the procurement, the State Ethics Commission ruled that the company could not receive an award under the subject procurement. In the second instance, a company that bid on a particular procurement proposed to use a subcontractor that had previously worked with the involved State agency on a project that was related to the subject procurement. This company was also barred from receiving an award.

Consequently, when it comes to assisting with specifications, the watchword is caution, both for State agency personnel and for vendors.

To view the State Public Ethics law, click on <http://www.lexislawpublishing.com/resources/mdcode.htm> and go to State Government Article, Title 15, Section 15-508. State Ethics Advisory Opinions can be viewed by clicking on [http://209.15.49.5/dsd\\_web/comar\\_web/subtitle\\_chapters/19A\\_Subtitles.htm](http://209.15.49.5/dsd_web/comar_web/subtitle_chapters/19A_Subtitles.htm).

## VI. Confidentiality Issues

Another important issue, particularly for purveyors of IT goods, software, services, etc., concerns the confidentiality of bids or proposals submitted to State agencies. Under the Access to Public Records section of the State Government Article, Annotated Code of Maryland, commonly known as the Public Information Act (PIA), once bids or proposals are received by a State agency they are considered public records. Per the PIA, most public records are subject to disclosure upon written request from any source.

This applies to all bids or proposals, not just successful ones. However, bids under the competitive sealed bidding or multi-step sealed bidding procurement methods are not subject to disclosure until the bid opening occurs. Further, proposals under the competitive sealed proposals procurement method may only be disclosed after an award has been made.

For any procurement method, however, confidential, proprietary information or trade secrets can be withheld from disclosure. But what is confidential - proprietary information or trade secrets? And who decides what qualifies for this disclosure exemption? The governing procedures are as follows.

The vendor makes the initial determination of what it deems to be confidential information. Every State solicitation that is expected to result in a contract over \$25,000 will have a clause warning bidders/offerors of their duty to identify those portions of their bid or proposal they consider to be confidential, trade secrets, etc. Such identification, though, must be accompanied by a justification of why disclosure of the information would be harmful.

The procurement officer, with the advice of the Office of the Attorney General, may agree to withhold the requested information, or may disclose the information, or may request additional justification for withholding information, or any combination of these actions.

Two important considerations:

1. You cannot make a blanket request of confidentiality for your entire bid or proposal. It is inconceivable that every word of every page would legitimately be confidential. Since the burden is on you to identify the confidential *portions* of your bid or proposal with justification, a statement of blanket confidentiality is typically viewed as if no identification had been made at all.
2. You are required to make any legitimate confidentiality declaration with the initial bid or proposal submission. State personnel have no duty to inform you of a request for your bid or proposal if you have not stated at the time of submission exactly what you consider to be confidential and why. This duty to clearly identify confidential sections of bids is especially crucial for the sealed bidding procurement method, since under this method bid packages are normally made available for inspection immediately after the public bid opening.

To view the law regarding public information, go to <http://www.lexislawpublishing.com/resources/mdcode.htm>, State Government Article, Part III. Access to Public Records, Section 10-611.

## VII. Notice of Procurement Opportunities

In order to participate in a procurement, a vendor must know that the procurement is taking place. Obtaining notification of procurement opportunities is thus a critical concern for would be bidders/offerors. Under the Maryland Procurement Law, only two types of public notice are required for either method of competitive procurement:

1. Publication of a solicitation notice in the *Maryland Contract Weekly*.
2. Mailing or otherwise furnishing IFBs/RFPs or notices of the availability of the IFB/RFP to a sufficient number of potential bidders/ offerors for the purpose of securing competition.

The *Maryland Contract Weekly* is published in printed form weekly by the Division of State Documents, typically on Tuesday of each week (unless a particular Tuesday is a holiday). An Internet version of the *Contract Weekly* is available on line at <http://www.sos.state.md.us/sos/dsd/html/index.html>. Subscriptions to the *Contract Weekly* may be obtained at a cost of \$125 per year for the printed version or \$79 for the on-line versions. You may call 410-974-2486 for information or to subscribe.) Vendors who wish to learn of procurement opportunities with DBM should visit the Maryland Contract Weekly website, the current "Bids and Proposal" section of DBM's website, or visit the Department's bid board located near the lobby at 45 Calvert Street, in Annapolis, MD.

ALL competitive procurements expected to result in contracts over \$25,000 in value *MUST* be advertised in the *Contract Weekly*. Procuring agencies may choose to also advertise solicitations in newspapers, trade publications, etc. However, any publication notice other than in the *Contract Weekly* is purely elective on an agency's part. Consequently, a vendor that is serious about competing for business in Maryland is wise to subscribe to the *Contract Weekly*.

Maryland does not maintain any type of statewide vendor list for either services or IT procurements. Nonetheless, individual departments or agencies may have their own vendor lists, and/or may have bid boards, audio bid boards, WEB pages for procurement opportunities, etc

Vendors may believe that sending a letter to one or more State agencies expressing general interest in certain types of procurements, or even requesting placement on a particular agency's vendors list (if there is one), would ensure their receipt of copies or notices of any current procurement opportunities. Whereas this action should help in learning of procurement opportunities, it is no guarantee.

Upon specific request for a solicitation that is "on the street," State agencies must send bidders a copy of the solicitation.

*Note: State agencies may charge a fee for a vendor to obtain a copy of a solicitation (IFB/RFP). If charged, this fee must be paid before a solicitation can be obtained.*

## **VIII. Specific Considerations for Competitive Procurements**

### ***1. Multiple Awards with Continual Technology and Price Updating***

This technique has been used for such areas as the purchase of microcomputers and peripherals and off-the-shelf software. Under this approach multiple vendors are awarded contracts to provide the needed items. Various minimum quality standards or other characteristics are mandated and the bid price(s) quoted by vendors as of the bid due date becomes a maximum that cannot be exceeded for the life of the contract. Once awards have been made, however, vendors are encouraged to continually offer better products for this maximum price or even lower prices in keeping with market conditions. State agencies are then free to select whichever vendor they judge to offer the best package of price and product at the time of their purchase. By allowing the continual refreshment of technology and price, in essence, a continual procurement is taking place among the limited number of awardees of the original or master contract.

### ***2. Multiple Awards with Task Order Phase***

This procedure is characterized by a need for perhaps a wide array of requirements that can be generalized in a master contract but which necessitate detailed responses to detailed situations as they arise during the contract term. Under this procedure a limited number of vendors are approved for an overall master contract which contains all of the State's boilerplate contract language and such other areas as MBE goals, acceptance conditions, payment frequency and conditions, liability, damages, and warranty provisions, etc. Each vendor participating in the master contract will also have various categories of unit bid rates that cannot be exceeded (unless there is a pre-specified objectively quantifiable adjustment mechanism in the master contract).

A second or "task order" procurement phase then occurs each time an agency has a specific need within the scope of the master agreement. Under the task order phase some or all (as spelled out in the master contract) of the vendors participating in the master contract are provided with the specific requirements of an agency. The vendors are given a relatively short time frame to submit a proposal of how it will meet the requirements, along with an overall price for the project. The agency will then select one of the responses for the specific task order award. The procedure for making the second (task order) phase award will also be contained in the master contract, as will directions on whether vendors must or may respond (bid) to a task order request.

### **3. *Multiple Phase Procurement with the Same Vendor***

Another technique that may be employed for complex procurements is to have a multiple phase procurement that is to be awarded to a single vendor, but which is awarded on the basis of first phase prices. This procedure is increasingly used when a vendor must complete a first phase (such as a needs analysis or assessment) to determine what is needed for a second or implementation phase. Since the second phase can't be known until the first phase is completed, there is no way to bid for both phases at the same time.

In the past, the usual solution to such a dilemma was to award the first phase through a competitive process. Then a separate, follow-up competitive procurement was conducted for the second phase based upon the findings of the first phase. As detailed earlier, however, the State Ethics law prohibits a vendor which assists in the preparation of specifications from bidding or participating in any subsequent competitively bid contract.

Of course, this means that the vendor which does a phase one assessment, etc., cannot bid to implement its findings/recommendations. This is both good and bad.

It's good for the reasons stated in the section dealing with the Ethics law. However, it's bad because the expertise that a vendor gained in accomplishing the first phase is now lost. It's also bad because many bidders stopped bidding on the first phase (inevitably the smaller, less valuable phase) so they could compete for the second phase. This shrinks the number of vendors competing for the first phase and often leads to higher than anticipated first phase costs.

Now State agencies make one of two fundamental decisions. They may still use the process of having one vendor do a first phase, which vendor is then barred from performing the second phase. However, in this case, as provided for in the specifications, the first phase vendor may also assist with the evaluation of the proposals for the second phase and may even help with oversight of the performance of the second phase vendor. In essence, this first phase vendor can become virtually a project manager. By expanding the role of the first phase vendor, hence the value of the first phase, more firms may be willing to forsake the second phase competition.

Alternatively, if an agency doesn't believe it can attract a sufficient number of quality first phase bidders/offerors and/or doesn't want to lose the expertise a vendor develops in performing phase one, it can structure its procurement with the expectation that the first phase vendor will also do the second phase. In this case, the vendors will only bid a specific price for the first phase and unit costs, such as hourly labor rates, that will apply for the second phase. A contract will then be awarded based upon offerors' judged ability to complete both the first and second phases, along with their first phase prices.

Under this approach, when the first phase is completed, the contractor will submit a detailed plan and the cost to perform the second phase. The State agency will typically then negotiate with the contractor concerning both the technical plan and the cost. Once agreement is reached on both aspects, product and price, a subsequent agreement is signed and the contractor tackles the second phase.

When using this approach the first phase specifications must specifically state the intent for a single vendor to perform both phases. Consequently, all vendors will know they are being judged on their perceived ability to do both phases in a cost efficient manner. Since there is not a separate competitive second phase procurement, this approach does not fall within the prohibitions of the Ethics law.

To protect the State, the first phase specifications will also reserve the right to do a competitive second phase procurement, if it is deemed to be in the best interest of the State. If a second phase competition is conducted, the first phase vendor would be barred from participating.

## **VIX. Intergovernmental Cooperative Purchasing**

One final technique that merits a brief mention is a procurement method called intergovernmental cooperative purchasing. In a nutshell, this method allows certain State primary procurement agencies to use contracts bid by an organization comprised solely of governmental entities or by other levels of government, such as Baltimore City, the counties, the Federal government, etc., and vice versa. For this method to apply, though, the specifications for the procuring government must have specifically stated that the resulting contract was available for use by other governments.

The purpose in mentioning this method is just to put you on notice of its existence. In the future if you read specifications from a State agency or from another level of government that contains such provisions, you can perhaps bid on the anticipation of gaining more business than that government alone might support.

*(See the more detailed explanation of the method which appears under the "Maryland Procurement Methods" section of this website.)*